Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

PETER D. DEMPSTER, JR.,

Petitioner,

v.

WASTE MANAGEMENT, INC., an ILLINOIS CORPORATION, t/a WASTE MANAGEMENT OF PITTSBURGH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the Pennsylvania Courts violate the constitutionally protected property rights of the Petitioner by engrafting onto his employment agreement, the statutory immunity provisions of the Pennsylvania Workers' Compensation Act thus voiding the contractual terms existing between the temporary laborer, the temporary employment agency and the borrowing entity with relation to the Petitioner's status as an employee?

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OPINIONS BELOW

The Superior Court of Pennsylvania, in an unpublished Memorandum Opinion dated January 8, 1999 at No. 924 Pgh. 1998, affirmed the lower court's ruling, granting the Defendant's Motion for Summary Judgment.

The Pennsylvania Supreme Court denied your Petitioner's Petition for Allowance of Appeal on May 12, 1999 at No. 53 W.D. Allocatur Docket 1999 from which Petition this Petition is taken pursuant to 28 U.S.C. § 1254(1).

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The Pennsylvania Court of last resort has refused to resolve an important outstanding constitutional issue thus creating a conflict between the basic constitutionally protected right of all private persons to enter into employment agreements when those agreements do not conflict with state laws or policies.

CONSTITUTIONS AND STATUTES INVOLVED

1. Article 1, § 10, clause 1 of the United States Constitution

No State shall . . . pass any Law impairing the Obligation of Contracts . . .

2. Amendment V of the United States Constitution

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

3. Amendment XIV, § 1 of the United States Constitution

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law

4. Article 1, § 1 of the Pennsylvania Constitution

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. Purdon's Statutes Annotated.

5. Article 1, § 17 of the Pennsylvania Constitution

No . . . law impairing the obligation of contracts . . . shall be passed. Purdon's Statutes Annotated.

6. § 303(a) of the Pennsylvania Workers' Act. 77 P.S. § 481

(a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

(b) In the event injury or death to an employe is caused by a third party, then such employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to receive damages by reason thereof, may bring their action at law against such third party, but the employer, his insurance carrier, their servants and agents, employes, representatives acting on their behalf or at their

request shall not be liable to a third party for damages, contribution, or indemnity in any action at law, or otherwise, unless liability for such damages, contributions or indemnity shall be expressly provided for in a written contract entered into by the party alleged to be liable prior to the date of the occurrence which gave rise to the action.

STATEMENT OF THE CASE

Waste Management of Pittsburgh ("WMP") is a corporation in the refuse collection business. WMP employs personnel who drive WMP-owned trucks and others who physically retrieve the trash from the residences and businesses which it services and place it into the trucks which transport it to a disposal site.

Network Industrial, Inc. ("Network"), a temporary employment agency, entered into hiring contracts with employees and then placed them in temporary positions with companies with which Network had also contracted, in order to supply these Network employees to said companies as temporary workers.

On March 2, 1995, Network entered into a contract with Respondent WMP, (which contract was drafted by WMP), entitled "Temporary Service Agreement". This contract designated a class of persons (temporary workers) as to whom Respondent WMP would have no responsibility and which would be a class of persons separate and apart from those permanent employees who

were hired by and worked directly for Respondent WMP.[1]

As specifically stated under the terms of this contract between WMP and Network, the temporary workers assigned by Network to WMP and utilized by WMP would be the sole responsibility of Network and remain Network employees. The terms of the contract between Network and WMP stipulated that the employment relationship between the workers it received from Network remained the employees of Network, and their status would not shift to WMP *at any time*. Some of the most significant language contained in the contract between Network and WMP included:

> 4. . . . **nothing contained in this Agreement shall be construed to alter in any fashion that independent contractor relationship.** The Contractor's [Network] employees assigned to perform work for the Company [WMP] **are solely the employees of the Contractor** [Network] . . .
>
> 9. The Contractor [Network] shall require **its employees** to comply with the Company's [WMP] safety policy . . .
>
> The Company [WMP] will provide the **Contractor's** [Network] **employees** with a copy of the Company's Safety Policy.
>
> 11. *Contractor [Network] Responsibility for **Employees***: Contractor will recruit, interview, test, select, hire and train the personnel to be assigned to perform work for the Company at no cost to the Company. **Contractor has the sole**

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[1] WMP permanent employees had their own employment contract with WMP.

> **responsibility to counsel, discipline, review, evaluate, determine pay rates, and terminate the personnel assigned pursuant to this Agreement.**

When your Petitioner was hired by Network in December of 1995, he too entered into a contract with Network which stated in part:

> ¶2. *I understand that I* [Dempster] ***am an employee of N.I.I.*** . . .

After being hired by Network, on January 2, 1996, Petitioner Dempster was placed by Network with WMP as a temporary "thrower/helper" on a refuse disposal truck.

Thereafter, on March 8, 1996, Petitioner Dempster sustained life threatening injuries when, while riding as a helper on the back step of a WMP owned and operated refuse truck, he was pinned between said truck and a brick wall after the truck slid backwards on ice.

It is uncontested that Network was the Petitioner's immediate employer.

> The lower courts' affirmations of the Respondent, WMP's Motion for Summary Judgment which precipitated this Petition focused on the issue of control as the sole legal determinative factor in evaluating the employment status of your Petitioner, Peter D. Dempster, Jr., at the time he was injured. It is contended by the Respondent that Petitioner Dempster was an employee of WMP at the time of his injuries pursuant to the borrowed servant doctrine. By operation of law, this prevents Petitioner

> Dempster from suing the Respondent for personal injuries which he sustained while assigned to Respondent through the auspices of Network Industrial, Inc., the agency by which he was employed.
>
> The question under review was initially presented in Petitioner's brief to trial court in opposition to Employer's Motion for Summary Judgment. The trial court ruled on May 7, 1998, sustaining the immunity provisions of the Workers' Compensation Act as it effected the employment agreements which are the subject matter of this Petition. There was no trial on the merits.

On January 8, 1999, the Superior Court of Pennsylvania affirmed the lower court's ruling from which your Petitioner filed his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania.

On May 12, 1999, the Supreme Court of Pennsylvania denied your Petitioner's Petition for Allowance of Appeal.

REASONS RELIED UPON FOR ALLOWANCE OF THIS WRIT

Both the United States Constitution, Article I, § 10, clause 1 and the Pennsylvania Constitution, Article I, § 17 provide that the state may not pass any "law impairing the obligation of contracts."

By failing to uphold the validity of your Petitioner's employment contract with Network on the pretext of § 303(a) of the Pennsylvania Workers' Compensation Act,

77 P.S. § 481, the lower courts are effectuating state interference with your Petitioner's right to contract, absent any legitimate state interest or public policy being sought to be protected. By doing so, the Petitioner, under color of law, is deprived of: 1) hi freedom to contract; 2) his standing as an employee of Network; and thereby, 3) his cause of action against WMP.

Petitioner would thereby be placed, by state intervention, into a group of employees who have been stripped of their right to sue for their personal injuries without their consent, and would also become victims of a discriminatory state practice.

A cause of action is synonymous with the "right" to bring an action. A "right of action" refers to the right to "enforce" a cause of action. A cause of action is a property right. 1 P.L.E. 138, 139, Action § 2. It can be bought, sold or contracted away.

Amendment V to the United States Constitution states that no person shall be deprived of property without due process of law. Amendment XIV, § 1:

> *. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .*

The Pennsylvania Constitution, Article I, § 1, states:

> *All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.*

President Judge Sheely, of the Court of Common Pleas of Dauphin County, Pennsylvania in addressing

federal infringement on the right of a Pennsylvania citizen to freely contract, stated:

> *The right of the individual to freedom of contract is not an absolute right, and is subject to regulation under the police power of the State; freedom of contract is, nevertheless, the general rule, and restraint is the exception and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Holgate Bros. Co. v. Bashore,* 45 Dauph. 274 at 291, 1938, affirmed 331 Pa. 255, 200 A. 672.

Courts should not get involved in contract reformation in the absence of a statute, public policy, fraud or some unlawful conduct.

As the freedom to contract is a clearly established constitutional right, it would be an illegitimate violation of that right, to prevent a person from freely establishing whose employee he would be. This is glaringly evident in light of WMP's contract with Network which also establishes the Petitioner is the employee of Network.

The parties, WMP, Petitioner and Network, were each free to reach their own contractual objectives by whatever terms they each saw fit and to assume whatever burdens or risks their respective bargaining objectives dictated.

Therefore, the judicial interjection of § 303(a) of the Pennsylvania Workers' Compensation Act into your Petitioner's civil action, in spite of the parties contractual agreements that Petitioner would remain the employee of Network, is both an unlawful and an unconstitutional infringement of Petitioner's freedom to contract. It is an attempt by state action to judicially encroach upon the constitutionally protected right of every citizen to freely

enter into contractual relationships, which right is protected by both the Pennsylvania and the United States Constitutions.

The lower courts, by their displacement of the Petitioner as an employee of Network and by their placement of him as an employee of WMP, have made an arbitrary, capricious and unreasonable status change of your Petitioner from the one he contractually arrived at which is a due process deprivation since your Petitioner has a property right in his cause of action against WMP. This property right was created by his contract with Network and was also confirmed by the contract between Network and WMP. The lower courts' decisions have created an unwarranted interference and invasion of Petitioner's freedom to contract and do not constitute a proper exercise of the police power of the State.

Only an "employer" is given immunity from lawsuits by "employees" under the Pennsylvania Workers' Compensation Act. However, in this case, by contract, Network was the employer of the Petitioner, not WMP. Therefore, the Petitioner should not be stripped of his cause of action against WMP.

By determining that the Workers' Compensation Act prevails in this matter, the Pennsylvania courts have violated both the United States and the Pennsylvania Constitutions.

Respectfully submited,

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APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PETER D. DEMPSTER, JR.:	No. 053 Western District Allocatur Docket 1999
Petitioner	Petition for Allowance of Appeal from Order of the Superior Court
v.	
WASTE MANAGEMENT INC., A ILLINOIS CORPORATION, T/A WASTE MANAGEMENT OF PITTSBURGH	
Respondent	

ORDER

PER CURIAM

AND NOW, this 12th day of May, 1999, the Petition for Allowance of Appeal is hereby DENIED.

a True Copy Patricia Honard
As of: May 12, 1999
Attest:
Chief Clerk
Supreme Court of Pennsylvania

PETER D. DEMPSTER, JR., Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
V.	:	
WASTE MANAGEMENT, INC., AN ILLINOIS CORPORATION T/A WASTE MANAGEMENT OF PITTSBURGH,	:	
Appellee	:	No. 924 Pittsburgh 1998

Appeal from the Judgment Entered May 7, 1998
In the Court of Common Pleas of Allegheny County
Civil, No. GD 96-11731

BEFORE: CAVANAUGH, ORIE MELVIN and BROSKY, JJ.

MEMORANDUM: FILED: JANUARY 8, 1999

Peter D. Dempster, Jr. appeals from the judgment entered upon the order granting defendant's motion for summary judgment. Appellant asserts that the trial court committed an error of law in granting summary judgment in favor of the defendant. After careful review, we affirm.

In March of 1995, Network Industrial, Inc. ("Network"), a temporary employment agency, entered into a service contract with Waste Management of Pittsburgh ("WMP"). Under the contract, Network agreed to provide WMP with temporary laborers. The agreement provided, however, that WMP was an independent contractor and that Network's employees assigned to perform work for WMP would remain solely the employees of Network. Therefore, Network remained responsible for paying employees assigned to WMP, as well as disciplining them

or terminating their employment. The agreement further provided that Network would carry workers' compensation insurance with a $1,000,000 minimum limit of liability.

On December 29, 1995, in response to a newspaper ad placed by Network, appellant applied for a position as a garbage collector with Network. After he filled out an employment application, Network hired appellant and informed him that he would be working with WMP as a "thrower/helper."[1] On December 30, 1995, appellant reported to WMP for a two-hour orientation, which consisted of viewing films and listening to supervisor's presentations. Upon completion of the orientation program, WMP determined that appellant was qualified for the position of "thrower/helper" and told him to report to work for training.

Appellant reported to WMP for work on January 2, 1996 and underwent training for the following two weeks. WMP employees supervised appellant during the training period. Upon concluding his training, appellant began working regularly as a "thrower/helper," putting in close to 40 hours per week. At deposition, appellant testified that WMP controlled his daily job assignments and daily work routine. He further testified that, although he received his weekly paycheck from Network,

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[1] A "thrower/helper" is one who assists the garbage truck driver by picking up trash at the various stops on a given route and placing it into the back or "hopper" of the truck. Between stops, the "thrower/helper" rides on a small platform on the back of the truck, holding on to a bar for balance.

he never saw any representatives from Network on WMP's premises during his employment with WMP.

Appellant's assignment with WMP lasted until March 8, 1996, when he was injured in a serious work-related accident. While appellant was riding on the back of a garbage truck, the truck's tires slipped on a patch of ice. The truck slid backwards into a brick wall, pinning appellant between the truck and the wall. Appellant sustained severe injuries as a result of the accident and was unable to return to work. Shortly thereafter, Network filed an "Employer's Report of Occupational Injury" as well as a "Notice of Compensation Payable" with State Workmen's Insurance Fund.[2] As a result, appellant has received and continues to receive workers' compensation benefits.

On October 3, 1996, appellant filed a complaint against WMP, alleging that his injuries were proximately caused by the negligence of WMP and its employees. During the course of pre-trial proceedings, WMP raised the defense of statutory immunity under the provisions of the Pennsylvania Workers' Compensation Act. WMP moved for summary judgment based upon this defense, and Judge Wettick entered an order granting WMP's motion and dismissing appellant's claim.[3] In reaching

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[2] Pursuant to the 1995 Service Agreement between Network and WMP, Network obtained workers' compensation coverage for appellant once appellant became employed with Network.

[3] At a pre-trial conference, the parties agreed to adjudicate the workers' compensation defense prior to trial at an argument before Judge Stanton R. Wettick. With the parties' consent,

this decision, Judge Wettick determined that appellant was precluded from bringing an action against WMP because WMP qualifies as a statutory employer under the provisions of the Workers' Compensation Act. Appellant appeals from that decision.

We begin by noting that our scope of review when reviewing an order granting summary judgment is plenary. ***Merriweather v. Philadelphia Newspaper, Inc.***, 470 A.2d 137, 140 (Pa. Super. 1996), ***appeal denied***, 548 Pa. 628, 693 A.2d 967 (1997). In reviewing the order, we must examine the record in the light most favorable to the adverse party and determine whether the moving party has established that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. ***Scopel v. Donegal Mutual Insurance Co.***, 698 A.2d 602, 605 (Pa. Super. 1997).

On appeal, appellant does not claim that genuine issues of material fact existed with respect to his case. Rather, appellant's sole argument is that the trial court erred in concluding that WMP was protected from liability under the Workers' Compensation Act. Appellant agrees that under the Workers' Compensation Act, WMP would normally be considered an employer, and, therefore, he would be precluded from bringing a claim against WMP under the statute. According to appellant, however, the 1995 service agreement between Network and WMP specifically provides that any employees supplied by Network would remain Network employees.

Judge Wettick categorized the proceeding as an oral motion for summary judgment.

Moreover, appellant argues that his contract with Network expressly provided that he was a Network employee. Therefore, appellant argues that WMP contractually waived its right to plead defenses under the Workers' Compensation Act.

Under § 481(a) of the Pennsylvania Workers' Compensation Act, an employer cannot be held liable to an employee in any action at law on account of any injury that the employee sustained during the course of employment. *See* 77 Pa.C.S.A. § 481(a) (1992 & Supp. 1998). The remedies provided under the statute are the exclusive remedies available to an employee for such injuries. *Id.* Therefore, the statute functions to preclude an employee from bringing an action at law against one who is considered an employer under the statute.

In cases such as the present, where one employer furnishes an employee to another employer, our courts have applied the "borrowed servant" doctrine to determine whether an employee is precluded from filing suit against the borrowing employer under the Workers' Compensation Act. In ***JFC Temps, Inc. v. Workmen's Compensation Appeal Board***, 545 Pa. 149, 680 A.2d 862 (1996), the Pennsylvania Supreme Court addressed the issue of when an employer-employee relationship exists under the "borrowed servant" doctrine. The Court stated:

> The test for determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is whether he passes under the latter's right of control with regard not only to the work to be done but also to the manner of performing it. The entity possessing the right to control the

> manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised. Other factors which may be relevant include the right to select and discharge the employee and the skill or expertise required for the performance of the work. Payment of wages may be considered but is not a determinative factor.

Id. at 153, 680 A.2d at 864. Therefore, in determining whether a borrowed servant is an employee within the meaning of the statute, "the issue of control remains the crucial test." ***Wilkinson v. K-Mart***, 603 A.2d 659, 662 (Pa. Super. 1992).

In ***Wilkinson v. K-Mart***, the plaintiff was an employee of Transco who drove trucks for K-Mart pursuant to a contract between Transco and K-Mart. *Id.* at 661. Plaintiff filed suit against K-Mart for injuries he suffered while unloading one of K-Mart's trucks. *Id.* In affirming the trial court's grant of K-Mart's motion for summary judgment, we held that the plaintiff was a borrowed servant and, therefore, precluded from filing suit against K-Mart under the Workers' Compensation Act. *Id.* at 662. In reaching our decision, we noted that although the contract between Transco and K-Mart expressly provided that plaintiff was an employee of Transco, for purposes of determining liability under the statute, the determining factor is who had the power to control the plaintiff's work and manner of performance. *Id.* Because K-Mart controlled the work to be done by the plaintiff, as well as the manner in which it was performed, we determined that K-Mart was a "statutory employer" for purposes of the Workers' Compensation Act. *Id.*

Similarly, in the present case, appellant attempts to assert the argument that WMP waived its statutory immunity under the Workers' Compensation Act through its contract with Network. However, under ***Wilkinson***, this contention is without merit. The determining factor is the conduct of the parties. Here, appellant's work and manner of performance were controlled by WMP from the time he began his training on January 2, 1997. Although Network provided appellant's weekly paycheck, appellant reported to WMP every day and received his assignments from WMP supervisors. Appellant testified that he never encountered any Network employees on WMP premises while he worked there. Therefore, because WMP exercised actual control over appellant on a daily basis, WMP qualifies as a "statutory employer" for purposes of the Workers' Compensation Act.

In addition, we note that WMP has not managed to invoke the protections of Workers' Compensation Act without paying for workers' compensation protection for its employees. Under the service agreement, WMP paid Network $11.90 per hour for temporary employees assigned to WMP. Network only paid its employees $7.00 per hour. The difference between the hourly rates constituted compensation to Network for providing workers' compensation protection, among other benefits. Therefore, WMP indirectly provided for appellant's workers' compensation by paying Network to provide coverage.

Having determined that WMP was entitled to judgment as a matter of law, we conclude that the trial court

did not err in granting the motion for summary judgment in favor of WMP.

Judgment affirmed.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

PETER D. DEMPSTER, JR., APPELLANT	:	
VS.	:	
WASTE MANAGEMENT, INC., AN ILLINOIS CORPORATION T/A WASTE MANAGEMENT OF PITTSBURGH, APPELLEE	:	NO. 924 PITTSBURGH 1998

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby affirmed.

BY THE COURT:

/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: January 8, 1999